U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 August 2004

OALJ NO.: 1997-BLA-00097

BRB NO.: 01-0205 BLA

In the Matter of

BOBBY RAY BALLENGEE
Claimant

v.

STERLING SMOKELESS COAL CORPORATION
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

William D. Turner (Crandall, Pyles, Haviland & Turner),
Lewisburg, West Virginia, for the Claimant

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig),
Washington, D.C., for the Employer

Toye Olarinde (Associate Regional Solicitor), Arlington, Virginia,
For the Director, Office of Workers' Compensation Programs

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER ON REMAND

I. Statement of the Case

This matter, which arises from Bobby Ray Ballengee's claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended (the Act), 30 U.S.C. § 901

et seq., is back before me a third time, most recently pursuant to a remand from the United States Court of Appeals for the Fourth Circuit in *Sterling Smokeless Coal Corp. v. Director, OWCP*, 72 Fed.Appx. 942, 2003 WL 21983730 (4th Cir. Aug. 21, 2003).[1] In its decision, the Court held that there was insufficient evidence in the record to identify Sterling Smokeless Coal Corporation ("Sterling Smokeless") as the responsible operator liable for benefits awarded to Ballengee under the Act "because the evidence in the record is insufficient to show that all of Ballengee's employers, subsequent to Sterling Smokeless, are unqualified to assume liability as the responsible operator." 72 Fed.Appx.947, 2003 WL 21983730*5. Accordingly, the Court remanded the case "for the development of further evidence on the ability of Ballengee's more recent employers to pay." *Id.* On remand, the record was reopened to permit the parties to offer additional evidence relevant to the responsible operator issue. Upon review of the record, including the newly submitted evidence, I conclude that the evidence is still insufficient to establish that all of the coal mine operators which employed Ballengee subsequent to Sterling Smokeless are unqualified to assume liability. Consequently, I dismiss Sterling Smokeless as the responsible operator and find that the Black Lung Disability Trust Fund is liable for Ballengee's benefits.

II. Procedural History

Ballengee originally filed his claim for benefits on September 20, 1993, alleging that he was totally disabled due to pneumoconiosis as he could no longer perform his job as a roof bolter in the coal mines because of shortness of breath and weakness. Immediately prior to filing his claim, Ballengee had been employed as a coal miner by Green Mountain Energy, Inc. (Green Mountain") for three years between 1990 and 1993. He had previously worked for several other coal mine operators, and the record developed in the case shows the following coal mine employment history:

> (1) Green Mountain Energy, Inc. - August 13, 1990 to September 13, 1993 (three years and one month of employment);
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> (2) Stoney Coal Company ("Stoney") - July 1, 1987 to August 11, 1990 (three years and six weeks of employment);
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> (3) Hansford Smokeless Collieries, Inc. ("Hansford") - February 9, 1987 to June 30, 1987 (four months of employment);
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> (4) Hendricks Mining, Inc. ("Hendricks") - April 24, 1986 to February 6, 1987 (nine and one half months of employment).
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> (5) Maben Energy Corporation ("Maben") - February 13, 1985 to December 8, 1985, April 13, 1983 to July 22, 1983, October 28, 1982 to December 18, 1982, March 15, 1982 to March 24, 1982 (15 months of employment);
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> (6) Riteway Coal Company ("Riteway") - 1984 (dates unknown);

[1] Pursuant to the Court's opinion, the BRB remanded the matter to the Office of Administrative Law Judges on November 5, 2003.

(7) Barrett Fuel Corporation ("Barrett") - September 16, 1982 to October 25, 1982 (six weeks of employment);

(8) Consolidation Coal Company ("Consolidation") - March 1982 to September 1982 (six months of employment);

(9) P G & H Coal Company ("P G & H") - February 1, 1982 to February 28, 1982 (one month of employment); and

(10) Sterling Smokeless Coal Corporation ("Sterling Smokeless") - September 1972 to April 1979, July 1979 to January 1980, September 1980 to December 1981 (eight and one quarter years of employment).

Director's Exhibits ("DX") 6-13. After an investigation, the Office of Workers' Compensation Programs ("OWCP") notified Ballengee on March 6, 1994 that it had made an initial determination that he was ineligible for benefits based on findings that the evidence did not establish that he is totally disabled due to pneumoconiosis. In this notice, the Claimant was given 60 days to either submit additional evidence or request a hearing. DX 35.

Ballengee took no further action on his 1993 claim, but he filed a second or "duplicate" claim on March 17, 1995.[2] DX 1. The OWCP considered the evidence submitted and made an initial determination on October 24, 1995 that Ballengee is entitled to benefits and that his last coal mine employer, Green Mountain Energy, Inc. ("Green Mountain") which was self-insured through its parent company, Adventure Resources, Inc. ("Adventure Resources"), was liable for benefit payments as the responsible operator. DX 32.[3] By letter dated October 30, 1995,

[2] The Act permits the filing of multiple or duplicate claims upon a showing of a material change in conditions. 20 C.F.R. § 725.309(d) (2000). A claimant demonstrates a material change by proving the existence of any element which defeated his prior claim and, once a material change is established, the administrative law judge must consider all of the record evidence, including that submitted with any prior claims, to determine whether the evidence supports a finding of entitlement to benefits. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1362-1363 (4th Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 1090 (1997).

[3] The applicable regulations implementing the Act's responsible operator provisions are those that were in effect prior to January 19, 2001 and, specifically, "the version of §§ 725.491-495 set forth in 20 C.F.R., parts 500 to end, edition revised as of April 1, 1999 . . . ." 72 Fed.Appx. at 946 n.1, 2003 WL 21983730*3 n.1. All citations herein to the Regulations, unless otherwise noted, are to the regulations in effect prior to January 19, 2001. Generally, those regulations impose liability on the coal mine operator which most recently employed the miner most for periods of cumulative employment of not less than one year. 20 C.F.R. § 725.493(a)(1). Additionally, in order to be held liable as a responsible operator, the operator must meet the requirements of 20 C.F.R. § 725.492 including the financial ability to assume liability which is demonstrated by either (i) obtaining a policy or contract of insurance, (ii) qualifying as a self-insurer under section 423 of the Act or (iii) possessing any assets that may be available for the payment of benefits. 20 C.F.R. § 725.492 (a)(4). The regulations further provide that "[i]n the

Employers Service Corporation ("ESC"), acting as the claims agent for Green Mountain, contested Green Mountain's liability and requested a formal hearing before an administrative law judge. DX 33. Because Green Mountain declined to voluntarily accept liability, the OWCP initiated interim benefit payments to Ballengee from the Black Lung Disability Trust Fund (the Trust Fund). DX 34. On January 19, 1996, the District Director, OWCP referred the case to the Office of Administrative Law Judges for hearing. DX 36. On February 9, 1996, ESC wrote to the Chief Administrative Law Judge, requesting that the case be remanded to the District Director for review of the responsible operator issue in view of the fact that Green Mountain was in Chapter 11, and it was uncertain whether they could financially assume black lung liability. DX 37. On May 8, 1996, the Director, OWCP joined in ESC's request for remand (DX 43), and on July 24, 1996, Administrative Law Judge Frederick D. Neusner remanded the case to the OWCP District Director. DX 47.

On remand, the OWCP released Green Mountain as the responsible operator and issued a notice naming Sterling Smokeless, which is insured by the Old Republic Insurance Company ("Old Republic"), as the responsible operator liable for payment of Ballengee's benefits. DX 48, 52. The OWCP declined to name Green Mountain or any other coal operator for whom Ballengee had worked subsequent to leaving Sterling Smokeless on the basis that Green Mountain, Stoney, Hansford, Barrett and Maben were in bankruptcy and because Ballengee had worked for Hendricks, Consolidated and P G & H for less than one year. DX 49. Sterling Smokeless contested its liability, and the District Director issued a proposed decision and order on September 18, 1996, awarding Ballengee benefits and determining that Sterling Smokeless is the primary responsible operator in light of the bankruptcy of Ballengee's more recent employers including Green Mountain. DX 55. The District Director then referred the case back to the Office of Administrative Law Judges on October 17, 1996. DX 57.

On January 7, 1998, I conducted a hearing at which Ballengee and Sterling Smokeless appeared. At the hearing, Sterling Smokeless reiterated its position that it is not the responsible operator, and it argued that liability for Ballengee's benefits should be assumed by the Trust Fund since the Director, OWCP had not established that Green Mountain and other mining companies owned and controlled by Adventure Resources which subsequently employed Ballengee for cumulative periods of not less than one year, are unable to assume liability as provided in the Act and Regulations. Hearing Transcript ("TR") 39-41. Since it appeared from my review of the evidence of record that the Director had not established that the operators which employed the Claimant subsequent to his employment with Sterling Smokeless are incapable of assuming liability for Ballengee's benefits, and since the Director had not appeared at the hearing or filed a post-hearing brief, I issued an order on July 31, 1998, giving the Director and any other interested party an opportunity to show cause why Sterling Smokeless should not be dismissed as party to this proceeding and the case remanded to the District Director to

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absence of evidence to the contrary, a showing that a business or corporate entity exists shall be deemed sufficient evidence of an operator's capability of assuming liability under this part." 20 C.F.R. § 725.492(b). If a miner's most resent employer is incapable of paying benefits, the regulations permit liability to be imposed on a prior qualifying operator. 20 C.F.R. § 725.493(a)(4); *Director v. Trace Fork Coal Company (Matney)*, 67 F.3d 503, 507 (4th Cir. 1995).

continue payment of Ballengee's benefits. The Director responded to the show cause order by submitting a letter which outlined its position on the responsible operator issue and documentary evidence relating to the Adventure Resources bankruptcy proceeding which was admitted as DX 58-62.[4] In my initial decision and order which issued on October 27, 1998, I noted that in cases where the Director releases a miner's most recent employer of not less than one year and seeks to impose benefit liability on a prior employer, the burden is placed on the Director to "develop and produce evidence that is adequate to demonstrate the more recent employer's inability to assume liability." Decision and Order at 12, citing *Director v. Trace Fork Coal Company (Matney)*, 67 F.3d 503, 507-508 (4th Cir. 1995) and *England v. Island Creek Coal Company (England)*, 17 BLR 1-141, 1-144 (1993); Certified Record at 224. I then found that the Director had not met this burden, stating,

> In my view, the evidence developed and submitted by the Director is inadequate to demonstrate that none of the operators which employed the Claimant subsequent to Sterling Smokeless is capable of paying the Claimant's benefits. Although the evidence is supportive of a finding that none of the more recent operators are capable of assuming liability for his benefits pursuant to section 725.492(a)(4)(i) or (ii) in view of the absence of any insurance policy and exhaustion of the assets of the self-insurance benefit trust, the record does not provide a clear answer to the question of whether any of the subsequent operators is capable of paying the Claimant's benefits by possessing assets which may be available pursuant to section 725.492(a)(iii). That is, the Director has only shown

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[4] The post-hearing evidence offered by the Director was described by the Benefits Review Board as follows:

> In addition to the above information, the Director submitted copies of the April 22, 1993 and the December 12, 1996 proofs of claim that he filed with the United States Bankruptcy Court for the Southern District of West Virginia in Adventure's bankruptcy proceedings. Director's Exhibits 58, 59. This evidence includes affidavits in which Mr. James DeMarce, the Director of the Division of Coal Mine Workers' Compensation, stated that Adventure and its subsidiaries and affiliates were authorized to self-insure contingent upon Adventure funding an irrevocable private Black Lung Trust approved by the Internal Revenue Service in 1984 (IRS Trust); that Adventure made a one time deposit in the IRS Trust; that the assets of the IRS Trust were exhausted as October 1996; that among the companies listed as subsidiaries and affiliates covered by the Adventure self-insurance authorization were Hendricks and Hansford; and that the Black Lung Disability Trust Fund (Trust Fund) began payment on approved Adventure claims in November 1996. Id. The Director also submitted copies of two Orders from the bankruptcy court regarding the sale of real property related to the Adventure bankruptcy. Director's Exhibits 60, 62.

Ballengee v. Sterling Smokeless Coal Corp., BRB No. 99-0258 BLA (Dec. 22, 1999) (unpublished), slip op. at 4-5 (footnote omitted). A more detailed discussion of the Director's evidence is set forth in my initial decision and order of October 27, 1998. *See* Certified Record at 220-221.

that 20 of a total of 46 Adventure Resources companies and their owner and President, H. Paul Kizer, have filed for bankruptcy. While it does appear from the late submitted evidence that Maben Energy, Stoney Coal and Green Mountain are among the 20 Adventure Resources companies involved in the bankruptcy proceedings, the record contains no evidence concerning the financial status of Hendricks Mining and Hansford Smokeless Collieries, for which the Claimant also worked, and it sheds no light on the relationship between these operators and the other Adventure Resources companies, thus precluding any inquiry into whether Hendricks Mining or Hansford Smokeless Collieries might be considered successors to Maben Energy, Stoney Coal and Green Mountain for purposes of imposing liability pursuant to section 725.493(a)(2). Given this dearth of evidence and the fact noted by Chief Judge Haden that there were eight to ten non-bankrupt affiliates participating in the action before him and a total of 46 Adventure Resources companies, some of which apparently continue to be solvent and operating, I am unable to conclude without resort to speculation that there are simply no assets sufficient to cover the Claimant's benefits in the possession of any entity which either employed the Claimant for a cumulative period of not less than one year subsequent to his employment with Sterling Smokeless or which could be held liable as a successor operator. It was this type of evidentiary void as to the existence of assets under section 725.492(a)(4)(iii) that led the *Matney* court to affirm the dismissal of the named prior operator and imposition of benefit liability of the Trust Fund:

* * * * *

In this case, the OWCP dismissed Green Mountain and declined to name any other operator affiliated with Adventure Resources as responsible operator apparently on the sole basis of ESC's representations that Adventure Resources and several of its affiliates had filed for bankruptcy. Though the Director later submitted some evidence relating to the status of the self-insurance benefits trust and bankruptcy proceeding, this evidence provides at most a rather hazy and a limited view of a very complex corporate structure and its financial situation, and it is, for the reasons discussed above, inadequate to support a finding that none of the more recent operators of their successors possess assets which might be available pursuant to section 725.492(a)(4)(iii) to satisfy liability for the Claimant's benefits. In these circumstances, where it is undisputed that the Claimant was most recently employed for cumulative periods of not less than one year by operators other than Sterling Smokeless and where the evidence is insufficient to demonstrate that these subsequent operators are incapable of assuming liability for the Claimant's benefits by any of the means specified in section 725.492(a)(4)(i) - (iii), the *Matney* and *England* decisions hold that Sterling Smokeless and Old Republic are entitled to be dismissed as parties, and liability for benefits must be assessed against the Trust Fund as the OWCP has declined to name any other employer as the responsible operator.

Decision and Order at 12-14 (footnotes and quotations omitted); Certified Record at 224-226.

The Director appealed my dismissal of Sterling Smokeless to the Benefits Review Board which rejected my findings and held that I "improperly concluded that Hansford and Hendricks could be responsible operators, as claimant worked for each of these companies for less than one year." *Ballengee v. Sterling Smokeless Coal Corp*., BRB No. 99-0258 BLA (Dec. 22, 1999) (unpublished), slip op. at 7. The Board also held that I erred in finding that the Director had not produced sufficient evidence to warrant imposition of liability on Sterling Smokeless:

> Moreover, contrary to the administrative law judge's finding that the Director's effort to establish that the employers subsequent to Sterling are not capable of assuming liability for the payment of benefits was inadequate, we hold that the Director offered substantial evidence that the employers for whom claimant worked more than one year following his departure from Sterling were in bankruptcy and, thus, incapable of assuming liability for payment of benefits.
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> Concerning the issue of whether Hansford and Hendricks were successor operators capable of assuming liability for payment of benefits, the administrative law judge's conclusion that Hansford and Hendricks may possess assets with which to pay benefits is speculative, and thus, insufficient to support his inference that these companies could be held liable for benefits. Decision and Order at 12-13. Similarly, the record lacks evidence to bolster the administrative law judge's assumption that Hansford and Hendricks are successor operators to Green Mountain, Stoney or Maben. In contrast, the record contains evidence sufficient to support the Director's position that Hansford and Hendricks had filed for bankruptcy, and that the physical location of the mines where claimant worked for Hansford and Hendricks was different from the physical location of the mines where claimant worked when employed by Maben, Stoney, and Green Mountain. Director's Exhibits 7-11, 58, 59. In addition, the evidence of record reflects that Adventure's self-insurance authorization included Hansford and Hendricks, and that Adventure was in bankruptcy. Director's Exhibits 15, 37, 49, 58. Finally, the record clearly shows that Hansford and Hendricks are separate entities for whom claimant worked less than one year. Director's Exhibits 7, 8, 13. Thus, the Director met his burden of providing evidence sufficient to demonstrate that all employers subsequent to Sterling are either incapable of assuming liability for the payment of benefits or employed claimant for less than one year and do not otherwise satisfy the definition of a responsible operator.

Id. at 7-8 (footnote omitted). Having concluded that the Director had introduced adequate evidence to support its designation of Sterling Smokeless as the responsible operator, the Board vacated my dismissal of Sterling Smokeless and Old Republic and remand the case to me for further findings regarding the identification of the proper responsible operator with instructions to "resolve this issue promptly and then consider the merits of the claim for benefits." *Id.* at 8.

On remand, I issued a decision and order on September 29, 2000, finding Sterling Smokeless to be the responsible operator based on the Board's ruling, and I awarded Ballengee benefits after finding that he had established that he suffers from complicated pneumoconiosis, thereby demonstrating a material change in conditions and invoking Act's irrebuttable presumption of total disability due to pneumoconiosis. Certified Record at 143-154. Sterling Smokeless appealed to the Board which affirmed my findings and award of benefits. *Ballengee v. Sterling Smokeless Coal Corp*., BRB No. 01-0205 BLA (Nov. 19, 2001) (unpublished). The Board subsequently denied a motion for reconsideration filed by Sterling Smokeless which appealed to the Fourth Circuit. The Court, as discussed above, granted Sterling Smokeless' petition for review, noting that the record contained evidence supportive of findings that some of Ballengee's employers subsequent to Sterling Smokeless may have been successors to one another and that not all of the coal mine operators affiliated with Adventure Resource's had filed for bankruptcy. 72 FedAppx. at 947, 2003 WL 21983730*4. Thus, Court held that "the Board had insufficient evidence to identify Sterling Smokeless as the responsible operator because the evidence of record is insufficient to show that all of Ballengee's employers, subsequent to Sterling Smokeless, are unqualified to assume liability as the responsible operator." *Id.*, 2003 WL 21983730*5.

By letter dated March 17, 2004, the Director requested that an order be issued allowing the parties 90 days to submit additional evidence on the responsible operator issue. No other party opposed the Director's request, and on April 1, 2004, an order was issued, granting the parties leave until July 1, 2004 to offer any additional evidence relevant to the ability of Ballengee's more recent employers to pay benefits. The order also established July 15, 2004 as the deadline for filing evidentiary objections and August 16, 2004 for filing briefs on remand limited to the responsible operator issue.

On March 31, 2004, Sterling Smokeless filed a motion to dismiss, asserting that it could not be identified as the responsible operator based upon the Fourth Circuit's ruling. The Director filed a timely response in opposition to the motion, and Sterling Smokeless submitted a reply to the Director's opposition. By letter dated June 9, 2004, the Director offered additional evidence on Ballengee's coal mine employment history. No objection to the Director's additional evidence was received, and it has been admitted as DX 63, Attachments A-J. On July 15, 2004, Sterling Smokeless renewed its motion to dismiss, addressing the Director's additional evidence. The record is now closed.

III. Sterling Smokeless' Motion to Dismiss

In its initial motion to dismiss, Sterling Smokeless contends that based upon the Fourth Circuit's determination that the Director failed to meet its burden of proof in identifying Sterling Smokeless as the responsible operator, "the only options available to DOL are to identify Adventure Resources or its owners and officers as the responsible operator or to accept liability on behalf of the Trust Fund . . . [i]n no event can Sterling Smokeless be held to be a responsible operator." Motion to Dismiss at 2, citing *Matney*. The Director responds that the Court remanded the case for the development of further evidence on the ability of Ballengee's more recent coal mine employers to pay his benefits and that its order cannot be construed as requiring dismissal of Sterling

Smokeless. Sterling Smokeless is right that the named operator in *Matney* was dismissed and liability imposed on the Trust Fund based on the Court's conclusion that the Director failed to fully develop evidence regarding more recent employer's ability to pay benefits. 67 F.3d at 507. The Board itself took the same approach in *England v. Island Creek Coal Co.*, 17 BLR 1-141, 1-144 (1993). Nevertheless, the Court in this case did not order that Sterling Smokeless be dismissed but instead remanded the case for further evidentiary development. Accordingly, I agree with the Director that dismissal of Sterling Smokeless is not required as a matter of law. However, as I find for the reasons outlined below that the evidence submitted by the Director on remand is insufficient to establish the inability of Ballengee's most recent employers to pay benefits, Sterling Smokeless is entitled to be dismissed on the merits.

IV. The Director's Additional Evidence

The Director has organized the newly submitted evidence as a chronology of Ballengee's coal mining employment history, beginning with his last employment with Green Mountain and working backward to his period of employment with Sterling Smokeless. The following is the Director's description of the new evidence:

> The Claimant worked for Green Mountain Energy, Inc. from August 13, 1990 to September 10, 1993 (3 years and 1 month of employment). The dates of employment are verified by the company's records and Social Security Statement of Earnings. Information from West Virginia, Secretary of State shows that Green Mountain Energy was terminated on May 15, 1999 and last filed an annual report in 1996. According to the Office of Workers' Compensation Program's Responsible Operator Section ("OWCP"), Green Mountain Energy was self-insured through its parent company, Adventure Resources Inc., which filed for bankruptcy. Pacer Service Center information shows that Green Mountain Energy, Inc. filed for bankruptcy on December 2, 1992 in the United States Bankruptcy Court, Southern District of West Virginia, Case No.5:92-bk-50485. (Attachment A).
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> The Claimant worked for Stoney Coal Company from July 1, 1987 to February 20, 1988; February 22, 1988 to April 21, 1990; April 23, 1990 to August 11, 1990 (3 years and 6 weeks of employment). The dates of employment are verified by the company's records and the Social Security Statement of Earnings. Information from the West Virginia Secretary of State shows that Stoney Coal Company was terminated on June 15, 2001 and last filed an annual report in 1996. According to OWCP's Responsible Operator Section, Stoney Coal Company was self-insured through its parent company, Adventure Resources Inc., which filed for bankruptcy. Pacer Service Center information shows that Stoney Coal Company filed for bankruptcy on December 2, 1992 in the United States Bankruptcy Court, Southern District of West Virginia, Case No.5:92-bk-50490. (Attachment B).
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> The Claimant worked for Hansford Smokeless Collieries Inc. from February 9, 1987 to June 30, 1987 (4 months of employment). The dates of employment are

verified by the company's records and Social Security Statement of Earnings. Information from West Virginia, Secretary of State shows that Hansford Smokeless Collieries Inc. was terminated on September 11, 1996 and last filed an annual report in 1993. According to OWCP's Responsible Operator Section, Hansford Smokeless Collieries Inc. was self-insured through its parent company, Adventure Resources, Inc., which filed for bankruptcy. Pacer Service Center information shows that Hansford Smokeless Collieries Inc. filed for bankruptcy on May 3, 1993 in the United States Bankruptcy Court, Southern District of West Virginia, Case No.5:93-bk-SO 149. (Attachment C).

The Claimant worked for Hendrick Mining Inc. from April 24, 1986 to February 6, 1987 (9-1/2 months of employment). The dates of employment are verified by the company's records and the Social Security Statement of Earnings. Information from the West Virginia, Secretary of State shows that Hendrick Mining Inc. was terminated on October 28, 1993 and last filed an annual report in 1993. According to OWCP's Responsible Operator Section, Hendrick Mining Inc. was self-insured through its parent company, Adventure Resources Inc., which filed for bankruptcy. Pacer Service Center information shows that Hendrick Mining Inc. filed for bankruptcy on May 3, 1993 in the United States Bankruptcy Court, Southern District of West Virginia, Case No.5:93-bk-50148. (Attachment D).

The Claimant worked for Maben Energy Corporation from October 28, 1982 to December 18, 1982; March 15, 1983 to March 24, 1983; April 13, 1983 to July 22, 1983; February 13, 1985 to December 8, 1985. (15 months of employment). The dates of employment are verified by the company's records and the Social Security Statement of Earnings. Information from West Virginia Secretary of State shows that Maben Energy Corporation last filed an annual report in 1996. According to OWCP's Responsible Operator Section, Maben Energy Corporation was self-insured through its parent company, Adventure Resources Inc., which filed for bankruptcy. Pacer Service Center information shows that Maben Energy Corporation filed for bankruptcy on December 2, 1992 in the United States Bankruptcy Court, Southern District of West Virginia, Case No.5:92-bk-50488. (Attachment E).

The Claimant worked for Riteway Coal Inc. from January 16, 1984 to January 4, 1985. The dates of employment are taken from form CM-911a. The Social Security Statement of Earnings shows the miner's [sic] earned $17,680.36 with this company. Information from West Virginia Secretary of State shows that Riteway Coal Inc. was terminated on May 15, 1990 and last filed an Annual Report in 1988. West Virginia Workers Compensation Division Insurance System shows coverage under Policy number 93000047 302 from August 14, 1984 to July 10, 1985. (Attachment F).

The Claimant worked for Barrett Fuel Corporation from September 16, 1982 to October 25, 1982 (6 weeks of employment). The dates of employment are verified by the company's records and the Social Security Statement of Earnings.

> Information from the West Virginia Secretary of State shows that Barrett Fuel Corporation was terminated on March 24, 1999 and last filed an annual report in 1995. According to OWCP's Responsible Operator Section, Barrett Fuel Corporation was self-insured through its parent company, Adventure Resources Inc., which filed for bankruptcy. Pacer Service Center information shows that Barrett Fuel Corporation filed for bankruptcy on December 2, 1992 in the United States Bankruptcy Court, Southern District of West Virginia, Case No.5:92-bk-S 0494. (Attachment G).
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> The Claimant worked for Consolidation Coal Company from March 1, 1982 to September 30, 1982 (6 months of employment). The dates of employment were determined from the form CM 911 which was filled out by the Claimant. The Social Security Statement of Earnings shows that the miner earned $11,752.37 from this company. (Attachment H).
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> The Claimant worked for PG & H Fuel Company from February 1, 1982 to February 28, 1982 (1 month of employment). The dates of employment were determined from the form CM 911 which was filled out by the Claimant. The Social Security Statement of Earnings shows the miner's earned $1,971.69 from this company. (Attachment I).
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> The Claimant worked for Sterling Smokeless Coal Corporation from September 28, 1972 to December 4, 1981 (8 and 1/4 years of employment). The dates of employment are verified by the company's records and the Social Security Statement of Earnings. According to OWCP's Responsible Operator section, Sterling Smokeless Coal is self-insured through Eastern Associated Coal Corporation c/o Old Republic Insurance Company. Information from the West Virginia Secretary of State shows that the company is still active. (Attachment J).

Director's Letter dated June 9, 2004 at 1-3. The "Pacer" information submitted by the Director consists of a "Case Summary" sheets which show the case type (*e.g.*, chapter 7 or 11), the filing date, presiding judge, date of last filing and the termination or closure date, if applicable.[5] For example, the summary sheets for Green Mountain and Stoney show that chapter 11 petitions were filed on December 2, 1992, that the cases were not converted to chapter 7 and that both cases were closed or "terminated" on February 7, 1997. DX 63, Attachments A and B. The Director's evidence shows that Hansford filed a chapter 7 petition on May 3, 1993, and the case was terminated without any discharge on December 7, 1995. *Id.*, Attachment C. Similarly, Hendrick filed a chapter 7 petition on May 3, 1993, and the case was terminated without discharge on October 28, 1993. *Id.*, Attachment D. The summary sheet for Maben Energy shows that it filed a chapter 7 petition on December 2, 1992, that the case was "converted" on July 25, 1996,[6] that the last filing was November 21, 2002 as of the date of the summary

[5] The PACER Service Center is the Federal Judiciary's electronic access system for U.S. District, Bankruptcy, and Appellate court records. *See* http://pacer.psc.uscourts.gov.

[6] The Bankruptcy Code permits a debtor to convert a chapter 7 case to a proceeding under chapter 11 (reorganization), chapter 12 (adjustment of debts of a family farmer) or chapter 13

(September 16, 2003, that no discharge had been entered as of September 16, 2003 and that the case status as of that date was "awaiting first meeting.") *Id.*, Attachment E. Finally, Barrett Fuel filed a chapter 7 petition on December 2, 1992 which was "converted" without discharge on February 15, 1995 and closed on March 24, 1999. *Id.*, Attachment G.

In support of its position that Sterling Smokeless is the responsible operator, the Director states that six of the nine operators that employed Ballengee after he left Sterling Smokeless (namely, PG & H, Consolidated, Barrett Fuel, Riteway, Hendrick and Hansford) all employed Ballengee for less than one year. The Director further states that Hendricks, Hansford and Barrett were also subsidiaries of Adventure Resources and filed for bankruptcy and that the remaining operators, Maben Energy, Stoney Coal and Green Mountain, were all a part of Adventure Resources and also filed for bankruptcy. *Id.* at 3.

V. Sterling Smokeless' Renewed Motion to Dismiss

In its renewed motion to dismiss, Sterling Smokeless points out that most of the additional evidence introduced by the Director on remand consists of copies of Director's Exhibits already in the record such as eleven copies of Ballengee's work history which was originally submitted as DX. 13 and duplicate copies of DX 4 and DX 15. Renewed Motion to Dismiss at 3. Sterling Smokeless also argues that the new evidence introduced by the Director, which consists of results of on-line database searches, discloses no new information and fails to cure the deficiencies in the proof identified by the Fourth Circuit. *Id.* Specifically, it asserts that the Director has offered no additional evidence addressing whether Hendrick, Hansford, Stoney and Green Mountain are successor operators to Maben Energy. *Id.* at 3-4. And, it responds that the Director's claim that Hendrick and Hansford cannot be responsible operators because they did not each employ Ballengee for one year misses the point because time worked for a predecessor company or companies is aggregated with the time worked for a successor. *Id.* at 4, citing 30 U.S.C. § 933(i);[7] *C & K Coal Co. v. Taylor*, 165 F.3d 254, 257 (3d Cir. 1999). Regarding the ability of Ballengee's more recent employers to pay his benefits, Sterling Smokeless argues that the Director's submission of the Pacer print-outs is "no different than the evidence that the Fourth Circuit declared inadequate" since the new evidence "does not establish that they are no longer financially viable or that they do not have successors that could assume financial responsibility for this claim." *Id.* at 5. Sterling Smokeless also asserts that the Director has not submitted any evidence that it has pursued the non-bankrupt Adventure Resources "affiliates or any other potential related companies to determine whether they are successors to Green Mtn., Stoney Coal, Hansford, Hendrick and Maben Energy, and whether they can assume financial responsibility for the claim." *Id.* at 5-6. It further contends that the newly introduced printouts from the website of the West Virginia Secretary of State do not establish inability to pay or non-existence on the part of any of Ballengee's more recent employers because the documents do not explain the meaning or legal significance of "terminated" status, and because

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(individual debt adjustment). 11 U.S.C. § 706(a). Since chapter 12 is limited to debtors who are individual family farmers, 11 U.S.C. § 109(f), and since chapter 13 is limited to individual debtors, 11 U.S.C. § 109(e), it would appear from the Director's evidence that Maben Energy's chapter 7 case was converted to a chapter 11 reorganization case that is still pending.

[7] It appears that Sterling Smokeless intended to refer to section 932(i) which addresses the liability of subsequent operators.

there is no evidence that any of these operators have been dissolved in accordance with West Virginia law. *Id.* at 6-7. Sterling Smokeless additionally argues that even if all of Ballengee's subsequent coal mine employers are no longer viable entities, it is the Director's fault for not pursuing these operators earlier and due process considerations preclude the Director from now imposing liability on Sterling Smokeless because the Director failed to perform a thorough investigation after Ballengee filed his duplicate claim in 1995. *Id.* at 7-8. Finally, Sterling Smokeless contends that the only reason Green Mountain is now unable to assume financial responsibility for Ballengee's claim is because the Director made a mistake in approving Green Mountain's self-insurance application or in setting the amount of the security at a level that vastly underestimated its liability, and it notes that under the Department's new regulations, an error by the Director in administering the Act's insurance provisions cannot result in assignment of a more recent operator's liability to a prior operator. *Id.* at 8, citing 65 Fed. Reg. 80008.

VI. Discussion, Findings and Conclusion on Remand

The additional evidence introduced by the Director on remand does close one of the many gaps in its proof that were identified in my initial decision and by the Fourth Circuit. Where the record was previously silent regarding the financial condition of Hendricks and Hansford, the Director's new evidence shows that both operators sought bankruptcy protection under chapter 7 on May 3, 1993, before Ballengee filed his duplicate claim. This at least suggests that these operators were then experiencing some financial trouble. However, the Director's new evidence raises more questions than it purports to answer. What was the outcome of the chapter 11 proceedings involving Green Mountain and Stoney and the Chapter 7 proceedings involving Hendricks and Hansford? Were any reorganization plans approved? Did any of these operators emerge from bankruptcy as new entities which might explain the absence of recent information on the West Virginia Secretary of State's website under their former corporate appellations? Was Maben's chapter 7 petition converted to a chapter 11 reorganization case as it would appear from the Pacer summary, and does this not indicate that Maben may be able to assume financial responsibility for Ballengee's benefits? None of these questions, which I find to be relevant and not speculative, are addressed by the Director's new evidence. Moreover, the Director has introduced no evidence that answers "the lurking concern that a later employer of Ballengee's may have succeeded to the assets of a prior employer of Ballengee." 72 Fed.Appx. at 947, 2003 WL 21983739*4. Consequently, I agree with Sterling Smokeless that, aside from the information on the chapter 7 bankruptcy filings by Hendricks and Hansford, the Director's new evidence adds nothing to the record and certainly fails to satisfy the Director's burden of producing sufficient evidence to establish that all of Ballengee's subsequent employers are unqualified to assume liability for his benefits by any of the various means established by the Act and Regulations. Accordingly, I again conclude that Sterling Smokeless is entitled to be dismissed as responsible operator and that liability for Ballengee's benefits must continue to be paid by the Trust Fund pursuant to *Matney* and *England*.

VII. Order

Sterling Smokeless Coal Corporation is **DISMISSED**, and the Black Lung Disability

Trust Fund shall continue to pay all benefits to which Bobby Ray Ballengee is entitled by virtue of his totally disabling complicated coal worker's pneumoconiosis.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge